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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

BUSINESS ELECTRONICS CORPORATION,
*Petitioner,*

v.

SHARP ELECTRONICS CORPORATION,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF OF FORTY-TWO STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS


| | Page |
|---|---|
| LIST OF COUNSEL | i |
| TABLE OF AUTHORITIES | xvi |
| INTRODUCTION | 1 |
| IDENTITY AND INTEREST OF THE AMICI STATES | 2 |
| A. Identity of the Amici States | 2 |
| B. Interest of the Amici States in This Case | 3 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | 7 |
| I. AN AGREEMENT BETWEEN A DEALER AND A MANUFACTURER TO TERMINATE A DISCOUNTING DEALER BECAUSE OF THE DISCOUNTER'S PRICE CUTTING IS ILLEGAL PRICE FIXING | 7 |
| A. Agreements, Whether Horizontal or Vertical, Which Have as Their Purpose and Effect the Raising, Depressing, Fixing or Stabilizing of Prices are Per Se Illegal | 7 |





| | Page |
|---|---|
| B. An Agreement to Terminate a Discounter Because of Its Price Cutting Has the Purpose and Effect of Raising or Stabilizing Prices | 13 |
| C. An Agreement to Terminate a Discounter Because of Its Price Cutting Has No Redeeming Virtues | 24 |
| II. PROSCRIBING AGREEMENTS TO TERMINATE DISCOUNTERS BECAUSE OF PRICE CUTTING DOES NOT PREVENT MANUFACTURERS FROM MAKING LEGITIMATE BUSINESS DECISIONS | 30 |
| A. This Court Has Fashioned Rules That Adequately Protect Manufacturers From Unwarranted Antitrust Liability | 30 |
| B. Manufacturers May Employ Certain Restricted Distribution Arrangements to Enhance Interbrand Competition | 33 |
| C. Existing Evidentiary Safeguards Foreclose Finding an Agreement from Ambiguous Circumstances | 36 |
| III. CONCLUSION | 43 |

## TABLE OF AUTHORITIES

### Cases


| | Page |
|---|---|
| Albrecht v. Herald Co., 390 U.S. 145 (1968) | 28 |
| Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) | 7,18 |
| Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982) | 39 |
| Beach v. Viking Sewing Machine Co., 784 F.2d 746 (6th Cir. 1986) | 23 |
| Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207 (4th Cir. 1983) | 39 |
| Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) | 24 |
| Burlington Coat Factory Warehouse Corp. v. Esprit de Corp 769 F.2d 919 (2nd Cir. 1985) | 37 |
| Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212 (5th Cir. 1986) | 13,14 17,18 19,20 25,41 |
| California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. 445 U.S. 97 (1980) | 18,38 |





| | |
|---|---|
| Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643 (1980) | 9 |
| Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979) | 15,16 17,19 27 |
| Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 356 (1977) | 6,10 11,24 25,31 33,34 |
| Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) | 10 |
| Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922) | 10,38 |
| Garment District, Inc. v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986) | 28 |
| Grams v. Boss, 97 Wisc.2d 332, 294 N.W.2d 473 (Wisc. 1980) | 3 |
| Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) | 18 |
| Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P.2d 833 (1976) | 3 |

Moffat v. Lane Co.,
594 F. Supp. 45
(D. Mass. 1984) ..... 20

Monsanto Co. v. Spray-Rite Service
Corp., 465 U.S. 752 (1984) ..... 6,10
13,14
32,36
40

Morrison v. Murray Biscuit Co.,
797 F.2d 1430 (7th Cir. 1986) ..... 20

Neyens v. Roth,
326 N.W.2d 294 (Iowa 1982) ..... 3

Northern Pacific Railway Co. v.
United States,
356 U.S. 1 (1958) ..... 7

People v. North Avenue Furniture
& Appliance,
645 P.2d 1291 (Colo. 1982) ..... 3

Pittsburgh Plate Glass Co. v.
Paine & Nixon Co.,
234 N.W. 453 (Minn. 1931) ..... 3

Spray-Rite Service Corp. v.
Monsanto Co.,
684 F.2d 1226 (7th Cir. 1982) ..... 39

Square D Co. v. Niagara Frontier
Tariff Bureau, Inc.,
106 S. Ct. 1922 (1986) ..... 12

State v. Readers Digest Assoc.,
81 Wash.2d 259, 501 P.2d 290
(1972) ..... 3



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297 U.S. 553 (1936) ..... 9

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Burlington Industries, Inc.,
763 F.2d 604 (4th Cir. 1985) ..... 20,23

324 Liquor Corp. v. Duffy,
107 S.Ct. 720 (1987) ..... 10

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& Co., 388 U.S. 365 (1967) ..... 33

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Optical Co.,
321 U.S. 707 (1944) ..... 10,38

United States v. Colgate & Co.,
250 U.S. 300 (1919) ..... 6,32
37,38

United States v. General Motors
Corp., 384 U.S. 127 (1966) ..... 9,16

United States v. Parke, Davis
& Co., 362 U.S. 29 (1960) ..... 10,11
18,28
38

United States v. Socony-Vacuum
Oil Co., 310 U.S. 150 (1940) ..... 8,9

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Potteries Co.,
273 U.S. 392 (1927) ..... 9

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Federal

Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) ..... 11

Departments of Commerce, Justice and the State, the Judiciary Related Agencies Appropriations Act, 1986, Pub. L. No. 99-180, Section 605, 99 Stat. 1136 (1985) ..... 12

15 U.S.C. § 1 ..... 4,7

15 U.S.C. § 15c ..... 2

McGuire Amendments to the Miller-Tydings Act, Ch. 745, 66 Stat. 631 (1952) ..... 11

Miller-Tydings Act of 1937, Ch. 690, 50 Stat. 693 (1937) ..... 11

Pub. L. No. 98-166, § 510, 97 Stat. 1102 (1983) ..... 12

State

FLA. STAT., § 542.32 (1985) ..... 3

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On Writ Of Certiorari To The
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For The Fifth Circuit

# BRIEF OF FORTY-TWO STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

## INTRODUCTION

The States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New

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Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia (hereinafter the "Amici States") submit this brief in support of Petitioner Business Electronics Corporation.

## IDENTITY AND INTEREST OF THE AMICI STATES

### A. Identity of Amici States

The chief law enforcement officers of the Amici States are charged by law with the duty to enforce their states' antitrust laws, as well as the federal antitrust laws. In addition, they represent their states and political subdivisions in treble damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of the natural citizens of their states.[1/]

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1/ 15 U.S.C. § 15c.



### B. Interest of the Amici States in This Case

The Amici States, in their capacity as parens patriae, play a major role in federal antitrust enforcement. Moreover, the states' own antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[2/] Therefore, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws consistently with underlying Congressional policy and with this Court's past decisions.

The Amici States support the contention of Business Electronics Corporation that agreements to

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2/ See, e.g., Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P.2d 833 (1976); People v. North Avenue Furniture & Appliance, 645 P.2d 1291 (Colo. 1982); Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982); Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 234 N.W. 453 (Minn. 1931); State v. Readers Digest Assoc., 81 Wash.2d 259, 501 P.2d 290 (1972); Grams v. Boss, 97 Wis.2d 332, 294 N.W.2d 473 (1980). See also, FLA. STAT. § 542.32 (1985); MD. COM. LAW CODE ANN. § 11-202(a)(2) (1983 Repl. Vol.); UTAH CODE ANN. § 76-10-926 (1979); VA. CODE § 59.1-9.17 (1987).

terminate discounting dealers because of their price cutting should be treated as per se violations of the antitrust laws. This contention is consistent with the Amici States' interest in sound antitrust policy and effective enforcement of the antitrust laws.

## SUMMARY OF ARGUMENT

I. Agreements made for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing prices are per se illegal under section 1 of the Sherman Act, 15 U.S.C. § 1. Price is the "central nervous system of the economy" and an agreement that interferes with the setting of price by free market forces is illegal on its face. The critical importance of price competition has led this Court to condemn price fixing agreements, even where the effect upon price may not be direct and immediate. This rule applies to both horizontal and vertical price fixing arrangements.

An agreement to terminate a discounting retailer because of its price cutting has the same pernicious



effect and lack of redeeming virtue as any explicit agreement to set retail prices at a specific level. Such an agreement eliminates price competition among dealers, limits consumer choice, and transfers wealth from consumers to non-discounting retailers. Consequently, per se condemnation of agreements to eliminate price cutters promotes competition by ensuring the viable presence of discounters in the market.

II. A rule of per se illegality for agreements to terminate discounters because of their price cutting will not adversely affect manufacturers' legitimate interest in establishing optimal product distribution systems. Manufacturers may impose reasonable non-price restraints upon their dealers. These restraints may enhance interbrand competition by enabling a manufacturer, through its distribution network, to compete more effectively against other manufacturers.

Further, unless a manufacturer has monopoly power, it may unilaterally impose restraints upon its dealers without antitrust scrutiny. Existing evidentiary rules require proof that tends to exclude the possibility of independent conduct before an agreement may be inferred. Termination of a discounter in response to a competing retailer's complaint is insufficient by itself to support such an inference.

These rules, embodied in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 356 (1977), United States v. Colgate & Co., 250 U.S. 300 (1919), and Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), provide manufacturers ample protection against unwarranted antitrust liability. Further, these rules generally provide the manufacturers with considerable flexibility to implement their distribution systems as they see fit. A rule of per se illegality for price fixing agreements, including agreements to terminate discounters because of their price cutting, does not



reduce this flexibility. If a plaintiff successfully overcomes these judicial safeguards, per se treatment of price fixing agreements is fully appropriate.

## ARGUMENT

### I.

### AN AGREEMENT BETWEEN A DEALER AND A MANUFACTURER TO TERMINATE A DISCOUNTING DEALER BECAUSE OF THE DISCOUNTER'S PRICE CUTTING IS ILLEGAL PRICE FIXING.

#### A. Agreements, Whether Horizontal or Vertical, Which Have as Their Purpose and Effect the Raising, Depressing, Fixing or Stabilizing of Prices Are Per Se Illegal.

Under section 1 of the Sherman Act, 15 U.S.C. § 1, restraints of trade that are inherently anticompetitive and devoid of redeeming virtues "are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958). Price fixing is one such trade restraint that has long been held a per se violation of the Sherman Act. Arizona v. Maricopa

County Medical Society, 457 U.S. 332 (1982); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

In Socony-Vacuum, this Court set forth the classic definition of the per se rule against price fixing. The per se rule is not limited to agreements that set prices at some specific level or in a "uniform and inflexible" fashion. 310 U.S. at 222. Instead, "any combination which tampers with price structures" is price fixing. Id. at 221. The per se rule applies to any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . ." Id. at 223.

The rationale for the per se ban against price fixing is clear. Price is the "central nervous system of the economy." Id. at 224 n.59. It is generally the most significant aspect of competition and, if eliminated, competition in other areas such as service and product quality may be of relatively little value to consumers.

The critical importance of price competition has led this Court to condemn all combinations that are



formed with the purpose and effect of tampering with prices. Indeed, this Court has expressly rejected the argument that price fixing should be legal if the price fixed is reasonable. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

The per se prohibition against price fixing is applied to a broad range of practices that do not directly set a specific price. For example, agreements to adhere to previously announced prices and terms of sale, Sugar Institute v. United States, 297 U.S. 553 (1936), agreements to buy surplus gasoline on the spot market to prevent prices from falling, Socony-Vacuum, 310 U.S. 150, and agreements to fix credit terms, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980), have all been condemned as per se illegal. The per se rule also applies to agreements to eliminate discounting, id. at 648, and to agreements to exclude discounting dealers from the market. United States v. General Motors Corp., 384 U.S. 127, 147 (1966).

The per se rule against price restraints applies to both horizontal and vertical agreements. This Court held vertical agreements to fix prices to be unlawful in its earliest decision on the issue. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Since then, the Court has consistently applied the per se rule to vertical price fixing. See, e.g., 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18, (1977); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922). These decisions recognize that vertical price fixing shares the harmful effects and lack of redeeming virtues that characterize other per se unlawful trade restraints. It eliminates intrabrand price competition at the retail level, may facilitate cartelization at the manufacturer level, Sylvania, 433



U.S. at 51, n.18, and replaces competitive pricing with a system where the contours of price competition are set by agreement. Parke, Davis, 362 U.S. at 46-47. The continuing vitality of the per se rule against vertical price fixing is wholly consistent with the Congressional determination that prices should be set by market forces rather than the private agreement of market participants.

Congress explicitly approved application of the per se rule to vertical price fixing by enacting the Consumer Goods Pricing Act of 1975,[3/] which repealed the exemption for state approved price maintenance agreements under the Miller-Tydings and McGuire Acts.[4/] See Sylvania, 433 U.S. at 51 n.18. The legislative history of the Consumer Goods Pricing Act

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3/ Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (amending 15 U.S.C. §§ 1, 45 (a)).

4/ Miller-Tydings Act of 1937, ch. 690, 50 Stat. 693 (1937); McGuire Amendment to the Miller-Tydings Act, ch. 745, 66 Stat. 631 (1952) (both repealed by the Consumer Goods Pricing Act of 1975).

makes it clear that Congress understood that repeal of the Miller-Tydings and McGuire Acts would lead to uniform nationwide application of the per se rule.[5/] In subsequent legislation, Congress reiterated its approval of the per se rule against vertical price fixing.[6/] Congress has also implicitly approved the application of the per se rule by acquiescing in this Court's application of the rule over a period of more than seventy-five years. See Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 106 S. Ct. 1922, 1930-31

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5/ See, e.g., H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975); S. Rep. No. 466, 94th Cong., 1st Sess. 1-3 (1975).

6/ See, e.g., Pub. L. No. 98-166, § 510, 97 Stat. 1102 (1983) (prohibiting Department of Justice appropriations for the purpose of altering or overturning the per se rule against vertical price fixing); Departments of Commerce, Justice, and the State, the Judiciary and Related Agencies Appropriations Act, 1986, Pub. L. No. 99-180, § 605, 99 Stat. 1136, 1169 (1985) (same; also criticizes the Department of Justice's Vertical Restraints Guidelines for adopting an overly narrow application of the per se rule).



(1986); Monsanto, 465 U.S. at 769 (Brennan, J., concurring).

B. An Agreement to Terminate a Discounter Because of Its Price Cutting Has the Purpose and Effect of Raising or Stabilizing Prices.

Petitioner, Business Electronics Corporation (BEC), is a former dealer in electronic calculators manufactured by respondent, Sharp Electronics Corporation (Sharp). BEC alleged and proved that Sharp conspired with Gilbert Hartwell, a rival dealer in Sharp calculators, to terminate BEC as a Sharp dealer. The jury's verdict that Sharp had committed a per se violation of section 1 of the Sherman Act was based upon its finding that there was an "agreement or understanding between Sharp and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price cutting." Business Electronics Corp. v. Sharp Electronics Corp., 780 F.2d 1212, 1215 (5th Cir. 1986). The primary issue in the court below, and the sole issue presented on this appeal, is whether the agreement found by the jury is

per se unlawful. The court below held that in the absence of an agreement to set prices "at some level," such an agreement must be analyzed under the rule of reason. Business Electronics at 1218.[7/] Because that holding establishes an unwarranted restriction on the scope of the per se rule against vertical price restraints, it should be reversed.

In the context of vertical restraints, it is important to distinguish between price and non-price restraints because the former are per se unlawful while the latter are analyzed under the rule of reason. Monsanto, 465 U.S. at 765. In making that distinction, the substance, purpose, and effect of a

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7/ The court below relied in part upon Monsanto as a basis for this holding. Nothing in the Monsanto ruling, however, requires an explicit resale price maintenance agreement for the per se rule to apply. The sole issue before the Court in Monsanto was whether there was sufficient evidence of agreement, not whether the alleged agreement fell into the category of price or non-price restraints. The Court left the issue of how to distinguish price restrictions from non-price restrictions for another case. Monsanto, 465 U.S. at 759, n.6. The instant case squarely confronts this distinction.



particular restraint determine whether it takes on the character of a "price restraint." Viewed from this perspective, agreements to terminate discounters because of their price cutting plainly fall within the per se rule.

When a manufacturer agrees to a dealer's request to terminate a competing dealer because of the competitor's price cutting, the pernicious effects are readily apparent. The favored dealer "has eliminated the possibility of price competition by the foreclosed dealer." Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979). As a result, the favored dealer will be able to raise or maintain its prices, generating excess dealer profits while reducing output, limiting consumer choice and transferring wealth from consumers to the dealer.[8/] This Court has recognized

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8/ VII P. Areeda, Antitrust Law ¶ 1457 at 167-68 (1986); see Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65 (1982) (arguing that the intent of Congress in passing the Sherman Act was to prevent restraints of trade that (Continued)

the anticompetitive effects of this type of agreement by holding per se unlawful an agreement between a group of dealers and a manufacturer to exclude discounters because of their price cutting. United States v. General Motors Corp., 384 U.S. 127 (1966).

In General Motors, a group of dealers pressured the manufacturer into eliminating discounting dealers, while in the instant case there was only one conspirator at the dealer level. This difference is insignificant. When a manufacturer's decision to terminate a discounting dealer is the product of an agreement with a full price dealer, and prompted by the terminated dealer's pricing policies, "both the purpose and effect of the termination [is] to eliminate competition at the retail level, and not, as in GTE Sylvania, to promote competition at the manufacturer level." Cernuto, 595 F.2d at 168. Moreover, when the decisive motivating factor in the conspiracy is the non-discounting dealer's attempt to eliminate price

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increase prices to consumers).



competition, the agreement is clearly a price restraint. As the court stated in Cernuto,

> It is true that the alleged combination in the case at hand did not set prices at an exact level. But such a traditional conspiracy is not a sine qua non of a per se violation of the Act under the price fixing rubric. If the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, it is then illegal per se.

Id. at 168-69.

In the present case, the Fifth Circuit rejected the Cernuto rule and held that an "agreement to terminate a price cutter does not fix prices at any specific or general level but merely frees the complaining dealer to set prices as he chooses." Business Electronics, 780 F.2d at 1216. The court reasoned that such an agreement only indirectly affects price and should be treated as a non-price restriction. Id.

This analysis is fundamentally inconsistent with the well-established definition of price fixing adopted in Socony-Vacuum and its progeny. An agreement to eliminate a discounting dealer is not necessary to

"[free] the complaining dealer to set prices as he chooses." The dealer is already "free" to price as he chooses--he just would rather not price competitively. Such agreements free the complaining dealer to set supra-competitive prices and deprive the discounting dealer of the freedom to set price as he chooses.[9/] As a result, the "freedom" that an agreement to terminate price cutters allows is the freedom to set prices without interference from competitive market forces, the very market regulator central to sound antitrust policy.

The jury rejected Sharp's contention that BEC was terminated for non-price reasons such as free riding or poor sales performance. Business

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9/ This Court has repeatedly emphasized the importance of permitting traders to set prices "in accordance with their own judgment." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 346 (1982) (quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980); Parke, Davis 362 U.S. at 46-47.



Electronics, 780 F.2d at 1219. The jury excluded the possibility that any possibly legitimate non-price restrictions were the basis for the termination. Rather, it found that the only purpose of the agreement was to eliminate price competition by BEC. Given that finding, it betrays a "certain unreality," id. at 1218, to contend that the agreement found by the jury was a non-price restraint.

The court below also ignored the crucial distinction, correctly made in Cernuto, between a manufacturer's decision to adopt non-price restraints that may enhance competition on the manufacturer level, and a dealer's use of the manufacturer to eliminate competition on the dealer level. See Cernuto, 595 F.2d at 168-69. The purpose and effect of the latter arrangement is to raise prices and generate excess profits for the dealer, without any redeeming virtue. It therefore deserves per se treatment as much as any explicit resale price maintenance agreement.

The court below stated that it is too difficult for a factfinder to distinguish a termination of a discounter because of its price cutting from a termination of a dealer to improve a manufacturer's distribution scheme. Business Electronics, 780 F.2d at 1217-18. According to the Fifth Circuit, the difficulty in making that distinction could deter manufacturers from structuring their distribution systems as they wish or from acting in response to dealer complaints--choices that Monsanto seeks to protect. Id. at 1217.

Lower courts have not had difficulty distinguishing terminations of dealers based upon non-price restraints from price motivated terminations. In cases where a non-price restriction was violated, dealer terminations have been found legal, even if such terminations were "in response" to price complaints. See, e.g., Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986); Terry's Floor Fashions, Inc. v. Burlington Industries, Inc., 763 F.2d 604, 614 (4th Cir. 1985); Moffat v. Lane Co., 594 F. Supp. 45 (D. Mass.



1984). Reversal of the Fifth Circuit's decision in the present case poses no risk that manufacturers will be unable to adopt and enforce non-price restraints that are legitimate under the rule of reason.

The court below also greatly exaggerated the difficulty of distinguishing between price and non-price motivation. Juries can discern a party's motivation from conflicting evidence. Objective evidence will usually be available that relates directly to the issue of price versus non-price motivation. There may be evidence suggesting a non-price purpose, such as evidence that the manufacturer had pre-existing non-price restraints; that the terminated dealer was not promoting the manufacturer's products adequately; that the terminated dealer had a poor payment record; or that the dealer had engaged in fraudulent sales practices. On the other hand, there may be evidence that the asserted non-price motivation was pretextual, such as when the manufacturer sells to dealers that maintain resale

prices but fail to provide desired services, while refusing to sell to dealers that provide the desired services but discount on price. The specifics of the dealer's complaint and the content and timing of the manufacturer's response to the complaint will also often indicate the parties' motivations.

Juries are fully capable of weighing this type of conflicting evidence and arriving at a verdict. As in Monsanto, if the plaintiff alleges that it was terminated for reasons of price and the defendant produces evidence of a non-price motivation, the Court may reasonably place a burden upon the plaintiff to rebut the defendant's asserted justifications.10/ If

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10/ One commentator has suggested that the burden of production could be allocated in the following manner. The dealer must first make a prima facie showing that it was terminated because of its price cutting. The burden of production would then shift to the supplier to show that it terminated the dealer for reasons other than price cutting. The burden would then shift back to the dealer to show additional probative evidence of price motivation, such as supplier assurances to complaining dealers, proof of termination of other price cutters, or failure to terminate non-discounting dealers that engaged in the (Continued)



the plaintiff is unable to produce evidence tending to show that the asserted non-price motivation is pretextual, the per se case could be dismissed on summary judgment or directed verdict. This approach has already been taken in a number of cases. See, e.g., Beach v. Viking Sewing Machine Co., 784 F.2d 746, 750 (6th Cir. 1986) (no agreement where manufacturer's refusal to deal was consistent with its use of exclusive distributorship, policy against transshipping, and service requirements); Terry's Floor Fashions, 763 F.2d at 614 (no agreement where termination consistent with anti-bootlegging policy). To contend that the entire issue must be taken away from juries because in some cases they may reach an incorrect conclusion suggests an unwarranted distrust of the jury system and an unwillingness to permit juries to carry out the

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same practices as the terminated dealer. Jacobson, On Terminating Price-Cutting Distributors in Response to Competitors' Complaints, 49 Brooklyn L. Rev. 677, 707-709 (1983).

tasks given them under the Seventh Amendment of the Constitution.

C. An Agreement to Terminate a Discounter Because of Its Price Cutting Has No Redeeming Virtues.

Only after considerable experience with the anticompetitive effects of a particular business practice will courts classify it as a per se violation of the antitrust laws. For example, in Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979), a blanket licensing arrangement over copyrighted musical compositions was literally "price fixing." However, the Court unanimously agreed that the arrangement had sufficient redeeming value so as to avoid per se condemnation because there was no other practical method for licensees to obtain their deserved fees for the use of their copyrighted music. Similarly, in Sylvania, the Court held that vertical non-price restraints must be analyzed under the rule of reason. Such restraints may achieve certain procompetitive efficiencies because they may be used



by new manufacturers to induce dealer investments, and by established manufacturers to induce retailers to engage in promotional activities or to provide services and repairs without fear of being undercut by "free riders." Sylvania, 433 U.S. at 55.

None of these redeeming virtues is present in the agreement found by the jury in the present case. BEC offered evidence that it was terminated because of its pricing policies. Sharp countered with evidence that it terminated BEC for free riding and poor sales performance. Business Electronics, 780 F.2d at 1219. Weighing the conflicting evidence, the jury dismissed as pretextual Sharp's contentions. Thus, BEC proved that Sharp and Hartwell agreed to terminate BEC because it was discounting, not because it was free riding or violating possibly legitimate non-price restraints.

An agreement merely to terminate a discounter cannot serve a manufacturer's interest in efficient distribution. Ordinarily, a manufacturer will seek to

promote interbrand competition at the retail level so that dealers will sell at optimum prices and in the most efficient manner. See L. Sullivan, Antitrust § 134a (1977). To this end, a manufacturer may try to limit intrabrand competition in order to prevent free riding or to achieve other efficiencies that the manufacturer believes would not occur under a regime of completely unfettered competition. Thus, a manufacturer's interests coincide with consumers' interest in maximum distributional efficiency.

A full price dealer's interests, however, are quite different from those of the manufacturer and consumer. The full price dealer seeks to obtain the highest markup possible and does not necessarily share the manufacturer's interest in an efficient distribution system. Facing competition from more efficient discounters, full price dealers seek affirmatively to prevent or retard the adoption of an efficient



distribution system.[11/] In the absence of aggressive price competition from discounters, full price dealers may abuse local market power derived from lack of consumer information and the high costs of consumer search to extract overcharges.[12/] Thus, when the purpose and effect of an agreement is to protect the full price dealer's interests in eliminating price competition, rather than those of the manufacturer, none of the potentially redeeming virtues identified in Sylvania are present and the per se rule should apply. Cernuto, 595 F.2d at 168.

Application of the per se ban on agreements to terminate discounters because of their price cutting promotes both intrabrand and interbrand competition by providing some measure of protection for discounting retailers. In the absence of a per se rule, powerful full price retailers can coerce manufacturers

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11/ Steiner, The Nature of Vertical Restraints, 30 Antitrust Bull. 143, 171-74 (1985).

12/ Id. at 151.

into cutting off discount retailers.[13/] This would eliminate intrabrand competition between full price and discount retailers, driving up prices, generating excess dealer profits, and transferring wealth from consumers to dealers.

Discount retailers frequently are able to offer lower prices due to their introduction of innovative, highly efficient methods of distribution.[14/] The advantages of these efficiencies will eventually lead to their widespread adoption. However, if powerful but

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13/ For example, in Garment District, Inc. v. Belk Stores Services, Inc., 799 F.2d 905 (4th Cir. 1986), a four hundred store department store chain coerced Jantzen and Puritan Sportswear into halting sales to a discount retailer. Id. at 907. The court's holding that a manufacturer's desire to placate a powerful retailer is a "legitimate, independent" reason for terminating a discounter, id. at 909, is in direct conflict with cases holding that an agreement may arise by coercion. Albrecht v. Herald Co., 390 U.S. 145 (1968); Parke, Davis 362 U.S. at 43. Garment District illustrates the ability of large retailers to coerce manufacturers into adopting restraints that serve retailer rather than manufacturer interests.

14/ See Gerla, Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases, 12 J. Corp. Law 1, 4-5 (1986); Steiner, supra at n.11, 153-55.



less efficient "ull price retailers can freely use their leverage over manufacturers, they may be able to delay or inhibit the introduction of innovative distribution practices. The result may be reduced efficiency and output throughout an entire industry.

Discounting retailers also can enhance interbrand competition. Price pressure from discounters forces competing retailers to seek price concessions from manufacturers.[15/] In many consumer goods industries, retailers carry a number of different brands. As a result, the entire industry feels the pressure for price concessions.[16/] Discounters can also force retail outlets to create private label brands to compete at

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15/ Gerhart, The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis, 1981 Duke L.J. 417, 426-27 (1981).

16/ Robert Steiner discusses one example of this phenomenon. After the FTC brought a complaint against Levi Strauss & Co., Levi Strauss ended its policy of preventing discounting by resale price maintenance. When discount outlets started a price war on Levi's brand jeans, competing manufacturers dropped their prices and prices for private label jeans also fell. Steiner, supra, 30 Antitrust Bull., at 181-83.

the budget-priced end of the market. See Gerla, supra, 12 J. Corp. Law at 7. Thus, if full price dealers can secure the termination of discounters, the impetus for interbrand competition will decrease.

In sum, agreements by which manufacturers terminate discounters because of price cutting immediately and directly stifle price competition at the retail level. Such agreements may also inhibit the development and use of innovative and efficient distribution practices. Their purposes and effects are identical to those associated with agreements that explicitly set a retail price level, and are therefore per se unlawful.

II.

PROSCRIBING AGREEMENTS TO TERMINATE DISCOUNTERS BECAUSE OF PRICE CUTTING DOES NOT PREVENT MANUFACTURERS FROM MAKING LEGITIMATE BUSINESS DECISIONS.

A. This Court Has Fashioned Rules That Adequately Protect Manufacturers From Unwarranted Antitrust Liability

Manufacturers have a legitimate interest in determining their most effective distribution methods



so that they may vigorously compete with other suppliers. Unless a manufacturer integrates the retailing function with the manufacturing and supply functions, it must rely upon independent business entities to perform the ultimate distribution of its products to consumers. This relationship of manufacturer and retailer typically involves agreements or understandings about how the products are sold at retail--agreements that may restrict the freedom of the retailer. The antitrust laws are designed to ensure that these restrictions do not unreasonably restrain the retailers' trade. However, this Court has been sensitive to the manufacturer's legitimate interest in determining its optimal distribution methods and has fashioned rules to protect that legitimate interest.

As discussed above, this Court has recognized that agreed-upon restraints that are characterized as "non-price restraints" are to be judged under the rule of reason. Continental T.V., Inc. v. GTE Sylvania, Inc.,

433 U.S. 356 (1977). Therefore, under current antitrust jurisprudence, an agreement must be characterized as a "price restraint" before a per se condemnation is invoked. The Court also has long recognized that truly independent manufacturer action is not proscribed by the antitrust laws. Thus, a manufacturer may announce in advance its policy of selling its products only to those retailers who will abide by a particular restraint, even a "price restraint," United States v. Colgate & Co., 250 U.S. 300 (1919), and refuse to deal with those retailers that will not. Additionally, legitimate unilateral conduct cannot be characterized as illegitimate concerted conduct unless evidence is presented that tends to exclude the possibility that a manufacturer and retailer were acting independently. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).

Given these rules, once a terminated discounter shows that it was terminated because of its pricing policies and pursuant to concerted action between its



supplier and its competing retailer, per se condemnation of that combination is appropriate. The supplier has received all the benefits of these judicial safeguards and if, despite these protections, a supplier is shown to have agreed with retailers to restrain price competition, application of the per se rule is fully warranted.

B. Manufacturers May Employ Certain Restricted Distribution Arrangements to Enhance Interbrand Competition.

In Sylvania, this Court ruled that non-price vertical agreements would be judged by the "rule of reason."[17/] Faced with a substantially declining market share, Sylvania restructured its ineffective distribution network by limiting the number of dealer franchises in an area and requiring each dealer to sell

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17/ Sylvania explicitly overruled this Court's ruling of only ten years earlier that when a manufacturer sells its product subject to territorial or other restrictions upon resale, a per se violation of the antitrust laws results. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

Sylvania products only from approved locations.[18] Some of the Sylvania dealers that were terminated as a result of this restructuring may have been discounters. However, the fact that discounters are terminated as a by-product of agreements establishing a new distributive scheme does not lead to the conclusion that the agreement was price-related. Rather, Sylvania's bona fide motivation was to improve its poor competitive standing against other manufacturers by inserting location restrictions in its dealer franchise agreements.

The underlying rationale of Sylvania is that a manufacturer has a legitimate interest in determining its most effective distribution methods to compete

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[18] It was not contested that an agreement between supplier and dealer did exist in Sylvania. Footnote 8 to the majority opinion reads:

> Although Sylvania contended in the District Court that its policy was unilaterally enforced, it now concedes that its location restriction involved understandings or agreements with the retailers.



with other manufacturers. Further, manufacturers have a significant stake in the manner by which their dealers sell their products to consumers. Therefore, manufacturers may enter into agreements with dealers specifying, for example, the territories within which or the classes of customers to whom their dealers may sell, the level of promotional activity their dealers must undertake, or a commitment by the dealers to service the manufacturer's products. By these restrictions, manufacturers modify competitive conditions within their distribution network. Although intrabrand competition may diminish, interbrand competition may be enhanced if the manufacturer and its dealers can compete more effectively against the distribution networks of other manufacturers.[19] It is

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[19] See, e.g., Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965).

these possible interbrand benefits that cause vertical non-price agreements to be judged by the antitrust rule of reason.

C. Existing Evidentiary Safeguards Foreclose Finding an Agreement from Ambiguous Circumstances.

In addition to drawing the distinction between price and non-price restrictions, this Court has emphasized the need to distinguish between independent and concerted action in dealer termination cases. See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 760-61 (1984). A non-monopolist manufacturer, for its own business reasons and through the exercise of its independent business discretion, may unilaterally restrain its dealers without implicating the antitrust laws because the requisite element of concerted action is absent.

A manufacturer can announce, before making sales to subsequent resellers of its products, its policy of selling its products only to those who will abide by the restraint (including only to those who will resell at



a suggested price).[20] United States v. Colgate & Co., 250 U.S. 300, 307 (1919). The manufacturer can then unilaterally refuse to make further sales to resellers who, for their independent reasons, choose not to follow the manufacturer's announced restraint. Id. This rule is completely consistent with the proper rationale for permitting some vertical restraints--a manufacturer has a legitimate interest in determining its optimal distribution methods and should be allowed to implement them as long as it does so unilaterally.[21]

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20/ Similarly, a retailer can announce its policy not to do business with manufacturers that supply products to discounters. Burlington Coat Factory Warehouse Corp. v. Esprit de Corp, 769 F.2d 919 (2nd Cir. 1985).

21/ Any form of manufacturer-initiated resale pricing program is worthy of heightened scrutiny, due to its intimate relation to that "central nervous system" of the economy--price. The key to the legitimacy of any suggested resale price program is the absolute preservation of resellers' freedom to conduct at all times their business, in their market and subject to their competitive conditions, in whatever manner they deem appropriate, including the freedom to sell at, below, or above the suggested retail price. An agreement, whether express, implied from a course of

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Manufacturers and dealers communicate for any number of reasons, however, and these communications are both solicited and unsolicited. Dealers commonly communicate complaints to manufacturers about competing dealers' business practices. These complaints frequently focus on a competing dealer's penchant for undercutting the retail price level and causing the complaining dealer to lose sales. Prior to Monsanto, proof of a dealer termination in response to a competitor's complaints may have been sufficient to support an inference of

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dealing or other circumstances, or imposed through coercion or intimidation, to secure adherence to suggested prices is a per se violation of the Sherman Act. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Colgate, 250 U.S. 300 (1919).



concerted action.[22/] To bar a manufacturer from independently effecting the most efficient distribution of its products, solely because the information upon which the manufacturer acts originated as a price complaint, could undermine the manufacturer's ability to implement that distribution scheme.

Therefore, to avoid inhibiting the manufacturer's exercise of its independent business judgment, this Court held that "something more than evidence of complaints was needed."

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently . . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'

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22/ See, e.g., Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1213-15 (4th Cir. 1983); Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, 1238 (7th Cir. 1982); Battle v. Lubrizol Corp., 673 F.2d 984, 990-92 (8th Cir. 1982). However, even under the rule of "termination in response to complaints," any inference of concerted action could be rebutted by other evidence.

Monsanto, 465 U.S. at 764 (citations omitted). This rule articulates the Court's belief that "termination in response to complaints" can occur for legitimate business reasons and is too ambiguous a circumstance to permit that fact alone to support a finding of concerted action.[23/]

The court below determined that there was sufficient evidence in the present case to support a jury verdict that concerted action was undertaken.

> There was evidence that, even before Hartwell became a dealer, Sharp sought BEC's adherence to the suggested retail price list. BEC produced evidence tending to show that it was not "free-riding" and that its sales performance was equal to Hartwell's. The logical inferences from such evidence, if drawn by the jury, could support a finding that BEC's termination was not due to the reasons Sharp suggests.
>
> In addition, there was evidence that Hartwell usually followed Sharp's suggested prices. There was also evidence that Hartwell sought to encourage BEC to follow these prices. Finally, the record shows that Hartwell complained vigorously to Sharp about BEC's pricing and that ultimately Sharp responded by terminating BEC. This evidence, taken as a whole and viewed in the light most favorable to BEC, could support an inference that Sharp and Hartwell had agreed that Hartwell would follow Sharp's suggested retail prices and that BEC's termination was pursuant to this agreement.

Business Electronics, 780 F.2d at 1219 (citation omitted).

A rule that an agreement between a manufacturer and a dealer to terminate a discounting dealer because of its price cutting is per se illegal does not undermine Monsanto in the least. A manufacturer may still legitimately act upon dealer complaints without stepping into the forbidden zone of concerted conduct. The court below mistakenly believed that a manufacturer's legal counsel could not fashion a means of safely terminating a discounting retailer if the manufacturer's antitrust liability turned solely on the fact-finder's determination of the manufacturer's motivation. Business Electronics, 780 F.2d at 1218.

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23/ The Amici States do not necessarily agree with the Monsanto ruling that "termination in response to complaints" cannot alone permit an inference of concerted conduct. However, as the propriety of the Monsanto rule is not now before this Court, no challenge to that rule is advanced here.

This is decidedly not the case. A manufacturer can, consistent with Monsanto, implement an "automatic" program for "handling" dealer complaints.

Upon receipt of a dealer complaint, the manufacturer can independently investigate the circumstances of the complaint and decide what further unilateral action, if any, to take. At the conclusion of the manufacturer's investigation, it can then communicate to the complaining dealer what actions, if any, it intends to take and, if appropriate, the reasons for those actions. The manufacturer will have stayed within the Colgate and Monsanto boundaries and legitimately protected the integrity of its chosen distribution system. In short, existing judicial rules adequately protect manufacturers and retailers from antitrust liability when proof of concerted activity among them is ambiguous.



## III.

## CONCLUSION

The Amici States respectfully submit that the decision of the United States Court of Appeals for the Fifth Circuit should be reversed and that the jury verdict in favor of petitioner, Business Electronics Corporation, be reinstated.

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Respectfully submitted,

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